NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID GOLKAR, Cross-complainant and Appellant, v. CENTRAL PACIFIC BANK, Cross-defendant and Respondent.	G044624 (Super. Ct. No. 30-2008-00114819) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Neufeld, Marks, Gralnek & Maker and Paul S. Marks for Cross-complainant and Appellant.

Manatt, Phelps & Phillips, Harvey L. Rochman and Benjamin G. Shatz, for Cross-defendant and Respondent.

This is the second appeal in this case. In the first appeal, defendant David Golkar appealed from a judgment entered against him following plaintiff Gray 1 CPB, LLC's (Gray 1) successful motion for summary adjudication of its cause of action for breach of a continuing guaranty. Gray 1 pursued that cause of action as the successor in interest to Central Pacific Bank (the Bank), the original beneficiary of the continuing guaranty. We affirmed that judgment. Golkar now appeals from a summary judgment entered in favor of the Bank on Golkar's cross-complaint against it for declaratory relief and breach of the implied covenant of good faith and fair dealing. Golkar argues that second judgment must be reversed because: (1) the Bank failed to satisfy its initial burden of showing an entitlement to judgment in its motion; (2) there were triable issues of fact as to whether the Bank breached its duty of good faith and fair dealing by requiring Golkar to sign a "sham" guaranty or by assigning its rights under that guaranty to Gray 1; (3) there were triable issues of fact concerning whether the Bank's conduct exonerated the guaranty; and (4) there were triable issues of fact as to whether the loan agreements underlying the guaranty were illegal and void because they failed to comply with the requirements of the Subdivision Map Act. (Gov. Code, §§ 66410 et seq.) We find none of these contentions persuasive and affirm the judgment.

I

This case arises out of a partially completed residential housing development located in Riverside County's San Jacinto Valley. Golkar originally became involved in the project in 2003, and together with another man, William Lo, acquired the property to be developed.

Golkar and Lo entered into negotiations with the Bank, with which Lo had a prior relationship, to obtain construction financing for the project. And because Lo had certain non-compete restrictions that prohibited him from acting as developer on the project, it was agreed Golkar would act as "front man" on the project.

Despite his front man status, Golkar had little direct involvement in the negotiation of terms for the construction financing. However, he did ultimately agree to a strategy, which he contends was proposed by the Bank. It involved formation of a corporation, Monte Carlo Group, Inc., of which Golkar would own 100 percent of the shares, to be the official developer of the project and the borrower of the construction financing. Golkar and Lo agreed to transfer the land for the project to Monte Carlo, and Golkar also agreed to act as guarantor of the corporation's liability.

Golkar signed the financing agreement, as well as both a "Continuing Guaranty" and a "Completion Guaranty," in August 2005. The loan agreement provided for a $43,425,000 total loan commitment, to be utilized as a revolving line of credit with the amount advanced at any one time not to exceed $19,000,000.

Development of the property apparently did not proceed as rapidly as anticipated, and by November 2007, the parties had agreed to four separate extensions of the loan's maturity date. Each extension agreement was accompanied by Golkar's express reaffirmation of the guaranties as well.

In early 2008, the parties were negotiating for a fifth extension, and the Bank initially indicated the extension would be granted. However, in May 2008, the Bank declined to further extend the loan, and instead notified Golkar and Monte Carlo the entire loan balance of over $12,000,000, was due and owing.

In the summer of 2008, the Bank sold both the loan and Golkar's personal guaranties to Gray 1, which in turn sued Golkar, alleging causes of action for breach of the continuing guaranty, breach of the completion guaranty and fraudulent transfer. In September 2009, Gray 1 moved for summary adjudication of its first cause of action for breach of continuing guaranty. The trial court granted that motion, and after Gray 1 dismissed its remaining causes of action, entered judgment in favor of Gray 1 on the complaint. We affirmed that judgment on appeal. (*Gray 1 CPB, LLC v. Golkar* (Apr. 26, 2011, G043600) [nonpub. opn.].)

Meanwhile, Golkar also filed a cross-complaint against the Bank, alleging numerous causes of action, including negligence, fraud, promissory estoppel, breach of contract, breach of the covenant of good faith and fair dealing, and seeking both indemnity and declaratory relief. Over the course of the litigation, those claims were winnowed down to one claim for declaratory relief, in which Golkar specifically sought a declaration limiting Gray 1's recovery under the guaranties to "the difference between the unpaid balance of the secured note plus expenses and the fair value of the real property security that [Gray 1] holds under the Loan Documents," and one claim for breach of the covenant of good faith and fair dealing, which was implied in the initial loan agreement, in the loan extension contracts, and in the guaranty agreements.

In February 2010, the Bank moved for summary judgment on those two remaining causes of action. With respect to the declaratory relief claim, the Bank argued there was no dispute as between *those parties* concerning whether Gray 1's recovery under the guaranties should be limited, and pointed out the court had already ruled, in connection with Gray 1's motion for summary adjudication, the continuing guaranty was fully enforceable. The Bank also contended the declaratory relief cause of action was internally inconsistent in any event, because it first asked the court to assume, *arguendo*, the guaranties were enforceable, before asking for a declaration that Gray 1's recovery under them be restricted.

With respect to the cause of action for breach of the covenant of good faith and fair dealing, the Bank argued Golkar, who was not himself a party to either the original loan agreement or the extension agreements, had no standing to assert any claim for breach of the covenant of good faith and fair dealing implied in *those* agreements. And with respect to its alleged breach of the covenant of good faith and fair dealing implied in the guaranty agreements themselves, the Bank argued none of the acts alleged by Golkar as violations of its implied obligations could be construed as such under the terms of the guaranties. The Bank supported its claimed undisputed facts with evidence filed in connection with the motion, as well as with other evidence already contained within the court's file.

In his opposition to the motion, Golkar made no arguments with respect to the declaratory relief cause of action. Instead, he argued the motion for summary judgment should be denied because the Bank violated its obligation to act in good faith toward him by: (1) "structuring the loan documents in such a way" as to create a sham guaranty; (2) breaching its contractual obligations under the loan agreements, which caused the failure of the development project, and then selling his guaranty to an investment fund with the knowledge that it would seek to collect; (3) agreeing to extend the loan term and then breaching that agreement; and (4) by improperly including "set aside funds" within the loan amount sold to Gray 1, despite the fact that ownership of those funds was disputed or uncertain. Finally, Golkar also argued that both the loan agreement and the guaranties were illegal and void under the terms of the Subdivision Map Act, and as a consequence of that illegality, the Bank violated its duty of good faith and fair dealing by selling those guaranties to a third party which it knew would seek to enforce them.

The court granted the motion for summary judgment, and signed a lengthy written order in which it essentially adopted each of the Bank's arguments.

II

Golkar's first argument is that the Bank failed to meet its initial burden of demonstrating there is evidence of all material facts necessary to entitle it to summary judgment. Specifically, Golkar faults the Bank for failing to "attach" freshly copied, and newly authenticated, copies of the agreements underlying this dispute to its summary judgment motion. What the Bank did instead was rely upon previously authenticated copies of those documents already contained within the court's file—and of which the court had previously taken judicial notice—and then clearly identified that existing evidence as the basis for its characterization of the agreements' content in its separate statement of undisputed facts. There is nothing objectionable in doing so.[1]

Code of Civil Procedure section 437c, subdivision (b)(1), does not require that all supporting evidence be attached to the motion. Rather, it merely provides that a motion for summary judgment "shall be *supported by* affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (Code Civ. Proc., § 437c, subd. (b)(1), italics added.) The statute then goes on to make clear that all such supporting evidence must be clearly identified in the required separate statement: "The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence." (*Ibid.*) That is what the Bank did in this case, and all that it was required to do. As long as the evidence is clearly identified, admissible, and properly before the trial court, it can be relied upon to support the factual contentions contained in a party's separate statement. There is no prohibition against a party relying upon used evidence.

Golkar relies on *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, to suggest there is some impropriety in relying upon documents contained within the court's file as evidence in connection with a summary judgment motion. However, he misapprehends the case. What the *DiCola* court questions, and its concern is made clear in its citation to its prior opinion in *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, is the propriety of

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1 Golkar does assert the Bank "made no effort to authenticate" the agreements it relied upon as evidence, but he simply ignores the fact the Bank expressly claimed the agreements contained in the court file had previously been authenticated. We will assume they were, because the burden on appeal is on Golkar, and he has made no effort to demonstrate otherwise. And as far as we are aware, the proper authentication of a document for purposes of its admission into evidence does not expire.

relying upon the content of the court's file to demonstrate support for factual contentions *not* included within the required separate statement. The court's concern is that a party to a summary judgment motion cannot rely on alleged facts to support its position if those facts are not set forth in the party's separate statement. That did not occur here.

In any event, we also agree with the Bank's contention that any objection Golkar had to the inadequacy of the Bank's evidentiary showing was waived by his admission, in his response to the Bank's separate statement, that the Bank's characterization of the language included in the governing agreements was "undisputed." Once Golkar conceded the contractual language was undisputed, the court was free to rely upon that concession in evaluating the summary judgment motion. (*Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 541 ["Hurley admitted each of the facts listed in State Farm's separate statement of undisputed facts. In doing so, he waived any objection to the exhibits, discovery responses, and deposition testimony which formed the evidentiary basis of State Farm's separate statement"].)

III

Golkar next argues the court erred in granting summary judgment because there were triable issues of fact pertaining to his cause of action for breach of the implied covenant of good faith and fair dealing.[2] Golkar's primary assertion is the overall structure of the loan transaction, which required the formation of the Monte Carlo entity

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[2] Just as Golkar offered no arguments in support of the viability of his cause of action for declaratory relief at the trial court level, he likewise offers none on appeal. Beyond a generic assertion the Bank's "acts of bad faith" created sufficient triable issues of fact that both "the causes of action for declaratory relief and breach of the covenant of good faith and fair dealing should have withstood summary judgment," he offers no arguments with respect to the declaratory relief claim. We consequently need not address that claim here, beyond an observation that whatever dispute there might have been about imposing limitations on the amount Gray1 could recover against Golkar on the guaranties was almost certainly rendered moot when Gray 1 obtained its final judgment against Golkar in this case.

to act as borrower, while Golkar himself agreed to act as guarantor of Monte Carlo's performance under separate agreements, resulted in the creation of a sham guaranty designed to avoid what would otherwise be applicable limitations on Golkar's personal liability as the true borrower. (See *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400 (*River Bank*).)[3] Specifically, Golkar asserts the Bank violated its duty to act in good faith toward him by failing to "*tell him* that that structure gave rise to a sham guaranty," and by failing to reveal to him the fact he was the true borrower of the funds, and thus would be entitled to rely on the protections of the anti-deficiency law.

There are several problems with this theory of liability, the most prominent one being that even if we assume Golkar's factual claims were entirely true, they would not state a cause of action for breach of the covenant of good faith and fair dealing implied in the guaranty agreements he entered into. As Golkar acknowledges, "[i]n general, the covenant imposes a duty upon a party to a contract not to deprive the other party *of the benefits of the contract.*" (*Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 314, italics added.) The only explicit benefit Golkar was entitled to under the guaranty agreements he entered into was the Bank's provision of the

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[3] As explained in *River Bank*, the sham guaranty doctrine operates as a defense to enforcement of a guaranty. "It is a factual question whether a person is a true guarantor or a principal obligor in guarantor's guise. (*Younker v. Reseda Manor* (1967) 255 Cal.App.2d 431, 438 . . . .) In this regard, the court in *Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 320 . . . , stated: 'The correct inquiry set out by the authority is whether the purported debtor is anything other than an *instrumentality* used by the individuals who guaranteed the debtor's obligation, and whether such instrumentality actually removed the individuals from their status and obligations as debtors. (*Valinda* [*Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106], 110.) Put another way, are the supposed guarantors nothing more than the principal obligors under another name? ([*Union Bank v. Dorn* (1967) 254 Cal.App.2d 157], 159.) As stated in *Union Bank v. Brummell* [(1969)] 269 Cal.App.2d 836, 838 . . . , *the legislative purpose of the antideficiency law may not be subverted by attempting to separate the primary obligor's interests by making a related entity the debtor while relegating the true principal obligors to the position of guarantors*." (*River Bank, supra,* 38 Cal.App.4th at pp. 1422-1423.)

loan funds to Monte Carlo, and there is no dispute it provided such funds—in fact it is that very provision of funds that both triggered Golkar's liability and determines its potential scope under the guaranties.

However, Golkar also claims that in the case of a surety or guaranty agreement, the creditor (in this case, the Bank) has an additional implied obligation to disclose, at the inception of the agreement, "facts unknown to the surety that materially *increase the risk* beyond that which the creditor has reason to believe the surety *intends to assume* . . . ." (*Sumitomo Bank of California v. Iwasaki* (1968) 70 Cal.2d 81, 90, italics added.) It is this obligation Golkar contends was violated by the Bank when it failed to inform him his status as guarantor constituted a sham, and he was legally entitled to be viewed as the true borrower in this loan transaction, with the attendant protections of that designation. Unfortunately for Golkar, that contention fails for two reasons: first, the sham guaranty doctrine is a legal defense, rather than a fact, and there is no authority suggesting that a creditor has any obligation to offer the surety or guarantor any legal advice; and second, even if the sham guaranty doctrine were treated as a matter of fact, its existence and application to Golkar in this case would have *decreased* his risk below that which he expressly intended to assume as a guarantor, rather than *increased* it. Even under Golkar's theory, the Bank had no obligation to inform him of facts that would decrease his potential liability below that which he indisputably intended to assume as a guarantor.

Ultimately, Golkar's real complaint is that the Bank failed to structure this loan transaction in a way that gave more explicit protection to his financial interests, and less to the Bank's own. In effect, Golkar is suggesting the Bank's obligation of good faith and fair dealing was in the nature of a fiduciary duty. "The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests" (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189), and a fiduciary is obligated to place the beneficiary's interests above its own. (*Warren v. Merrill* (2006) 143 Cal.App.4th 96, 108-109.) But a Bank is not generally a fiduciary and does not assume such responsibilities when it lends money. "Under the common law, banks ordinarily have limited duties to borrowers. Absent special circumstances, a loan does not establish a fiduciary relationship between a commercial bank and its debtor." (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 740, citing *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979-981.) "[I]n this state a commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights." (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334.) Thus, the Bank had no special obligation to protect Golkar's interests when it structured the loan transaction at the heart of this dispute. That was Golkar's job, and the Bank cannot be held liable for failing to do it for him.

In any event, if the transaction at the heart of this dispute actually created a sham guaranty, as Golkar contends, that does have legal consequences for the Bank and its assignee, those consequences are embodied in the sham guaranty doctrine itself, which renders such a guaranty unenforceable. Golkar was, of course, free to assert and prove that defense against Gray 1's cause of action to enforce the continuing guaranty, and had he done so, he would have been absolved of liability. That was Golkar's remedy. But he failed to do that. Instead, we concluded that he waived the defense, as part of our opinion affirming the earlier judgment *enforcing* the continuing guaranty in favor of Gray 1. Because that judgment is final, principles of collateral estoppel preclude Golkar from now claiming the guaranty was not enforceable. "[A]n issue may not be . . . split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it *matters which, if urged, would have produced an opposite result* . . . This principle also operates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them." (*Interinsurance*

Exchange of the Auto. Club v. Superior Court (1989) 209 Cal.App.3d 177, 182; *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 401-402.)

IV

Golkar next asserts there are triable issues of fact concerning his allegations the Bank breached the covenant of good faith and fair dealing when it engaged in acts that "increased the obligations of the borrower [Monte Carlo] . . ." under the loan agreement without obtaining his consent as guarantor.[4] Specifically, Golkar claims there is evidence the Bank reneged on an agreement to extend Monte Carlo's loan for a fifth time, and evidence the Bank "breached its obligations to [Monte Carlo] in the course of its loan administration . . ." both of which were acts that Golkar claims "increas[ed] [Monte Carlo's] obligations without the guarantor's consent." Neither of these assertions raises a triable issue of fact in this case.

The purported agreement to extend the loan term for a fifth time was, by Golkar's own description, an "oral agreement" that was "sealed" by "a handshake." Such an agreement was of no legal effect, as it is undisputed Monte Carlo's underlying loan agreement could only be amended *in writing*. Because the oral agreement had no legal effect, the Bank's alleged act of reneging on it was likewise of no legal consequence and cannot be construed as having any effect, one way or the other, on Monte Carlo's obligations under the then-existing written loan agreement.

And the Bank's alleged breach of its obligations to Monte Carlo "in the course of administering the loan" pertains to funds that were the subject of a set aside

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4 According to Golkar, conduct that increases the obligations of a borrower without obtaining the consent of a guarantor has the effect of exonerating the guaranty. However, we need not address that specific legal point, as a contention the guaranty is "exonerated" is legally indistinguishable from the assertion the guaranty is "unenforceable" for collateral estoppel purposes. As we have already explained, Golkar is party to a prior judgment that enforced the continuing guaranty. Any claim he might have made that the guaranty was exonerated was necessarily determined adversely to him in connection with that judgment. He cannot relitigate the point.

agreement involving the City of San Jacinto and a bonding company. As Golkar explains it, the set aside letter was part of a complicated arrangement to ensure compliance with Monte Carlo's promise to the City of San Jacinto to build and pay for "public improvements" as a condition of the city's approval of the development project.

Monte Carlo was required to provide the city with a performance bond to secure its promise to complete the public improvements, and the Bank apparently agreed to provide collateral for that performance bond by promising to set aside a portion of the loan funds in a separate line item dedicated to the completion of the "Set Aside Improvements." According to the terms of the set aside letter, the line item constituted "an irrevocable commitment of funds [which] is not subject to recall," and those funds "could only be disbursed for the construction of the public improvements, and only upon written consent of Monte Carlo. The set aside letter also provided that if the project went into default, "any funds in the Set Aside line item category not withdrawn shall immediately be made available to the [bonding company] in connection with its liability under the . . . Bonds(s) [*sic*] to cover the cost of the Set Aside Improvements . . . ." Golkar claims the legal effect of the set aside letter was to make the set aside funds "the property of the bond company and/or the [c]ity once there was a default[,]" and to deprive the Bank itself of any ownership interest in them.

Unfortunately, Golkar's description of the Bank's alleged wrongdoing in connection with the set aside letter is cursory, contradictory, and not at all clear. In the introductory section of his opening brief, Golkar explains that because there was a triable issue of fact as to the *ownership* of the set aside funds, the Bank "had no right to sell that portion of the loan" to Gray 1. Golkar claims that by doing so, the Bank purportedly "increased [Golkar's] liabilities [under the guaranty] without [his] permission or knowledge," thus violating the covenant of good faith and fair dealing that it owed to him. That assertion is entirely unsupported by either citation to the record or legal analysis, and we shall consequently deem it waived. It is not sufficient for an appellant to simply claim there is a triable issue of fact. It is the appellant's burden to demonstrate the *existence* of such an issue by citation to the evidence that was placed before the trial court. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [rejecting appellants' conclusory assertion that "'a plethora of admissible evidence'" demonstrated the existence of a triable issue of fact].)

In the argument portion of his brief, Golkar makes an entirely different claim with respect to the set aside letter: He asserts the Bank's wrongdoing in connection with the set aside letter was a *failure to disclose*: "In assigning the monies represented by the Set Aside Letter to a third party without informing [Golkar] that such monies had not been set aside and that upon default, the monies became the property of a party other than [the Bank], the Bank once again violated its duties of disclosure and the covenant of good faith and fair dealing." However, even assuming that scenario could give rise to liability (and we need not reach any such conclusion) Golkar has once again failed to support his assertions with any citation to the record—specifically, he cites to no evidence indicating either that the funds governed by the set aside letter had *not been set aside*, or that the Bank had not informed him of either that alleged failure or the effect a default would have on the ownership of the set aside funds. Consequently, Golkar has waived this claim as well and has failed to demonstrate the existence of any triable issues of fact with respect to the Bank's handling of the set aside funds.

V

Golkar final's contention is that the entire loan transaction between the Bank and Monte Carlo, and by extension his guaranty as well, was illegal and unenforceable as it was entered into in violation of Government Code section 66499.30, subdivision (a), which is part of the Subdivision Map Act. He contends that in light of that illegality, the Bank breached its duty of good faith and fair dealing by "selling the guaranty to an investment fund [i.e. Gray 1] it knew would pursue [Golkar] on the guaranty."

There are several problems with this assertion, the most prominent one being the undisputed fact that the guaranties at issue here explicitly gave the Bank the option of assigning its rights to a third party. It is well settled the covenant of good faith and fair dealing implied in a contract cannot be interpreted in a manner that precludes a party from exercising the rights expressly granted to it in the contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374, ["We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement"].) Similarly, "the implied covenant cannot be used to limit or restrict an express grant of discretion to one of the contracting parties." (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1062, citing *New Hampshire Ins. Co. v. Ridout Roofing Co.* (1998) 68 Cal.App.4th 495, 504, fn. omitted.)

However, a more fundamental problem with Golkar's claim is that it is based on a legal theory—the purported effect of the Subdivision Map Act on the validity of the loan transaction—that we already rejected in connection with his prior appeal. And having done so, we are barred by the doctrine of law of the case from reconsidering that same contention *in this appeal*.

"[W]here an appellate court states a rule of law necessary to its decision, such rule '"must be adhered to"' in any '"subsequent appeal"' in the same case, even where the former decision appears to be '"erroneous."'" (*People v. Whitt* (1990) 51 Cal.3d 620, 638, quoting *People v. Shuey* (1975) 13 Cal.3d 835, 841.) The law of the case doctrine "prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances." (*Id*. at at p. 638.)

Golkar claims no change in circumstances since we decided his prior appeal, significant or otherwise. He argues only that our analysis of the issue produced the wrong conclusion. That is an insufficient basis to justify our reconsideration of the point in this appeal.

VI

The judgment is affirmed. The Respondent is to recover its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.